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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 171.

CHAUNCEY D. SPAIDS, PLAINTIFF IN ERROR,

vs.

DENNIS N. COOLEY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 3, 1881.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 *Declaration. Filed Dec.* 13, 1876.

In the Supreme Court of the District of Columbia.

CHAUNCEY D. SPAIDS *vs.* DENNIS N. COOLEY.	At Law. No. —.

The plaintiff, Chauncey D. Spaids, sues the defendant, Dennis N. Cooley, for that the defendant is indebted to the plaintiff for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant, and for work done and materials provided by the plaintiff for the defendant at his request, and for money lent by the plaintiff to the defendant, and for money paid by the plaintiff for the defendant at his request, and for money received by the defendant for the use of the plaintiff at his request, and for money found to be due from the defendant to the plaintiff
on account stated between them. And the plaintiff claims six
2 thousand five hundred and ninety-three and $\frac{70}{100}$ dollars, with
interest from the 1st day of July, 1868.

S. S. HENKLE,
Att'y for Pl't'ff.

The defendant will plead hereto on or before the first special term, occurring twenty days after service thereof; otherwise, judgment.

S. S. HENKLE,
Att'y for Pl't'ff.

Summons. Issued December 13, 1876.

In the Supreme Court of the District of Columbia.

CHAUNCEY D. SPAIDS, Plaintiff, *vs.* DENNIS N. COOLEY, Defendant.	At Law. No. 16894.

The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first
day of its special term, occurring 20 days after service of this
3 writ on you, to answer the plaintiff's suit, and show why he
should not have judgment against you for the cause of action
stated in his declaration.

Witness D. K. Cartter, Chief Justice.

R. J. MEIGS, *Clerk,*
By J. R. YOUNG, *Ass't Clerk.*

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

S. S. HENKLE.

Marshal's Return on Back of Summons.

Served copies of the declaration, notice to plead, affidavit, and this summons on the *the* defendant, not to be found, the 23 day of January, 1877.

A. SHARP, *Marshal.*

Alias Summons. Issued March 2, 1877.

In the Supreme Court of the District of Columbia.

CHAUNCEY D. SPAIDS, Plaintiff,
vs. } At Law. No. 16894.
DENNIS N. COOLEY, Defendant.

4 The President of the United States to the defendant, Greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, Chief Justice.

R. J. MEIGS, *Clerk,*
By J. R. YOUNG, *Ass't Clerk.*

NOTE.—The special terms of the court commence on the first Tuesday of every month, except August, in which month there is no term of the court.

HENKLE.

Marshal's Return on Back of Summons.

Served copies of the declaration notice to plead, affidavit, and this summons on the defendant the 2d day of March, 1877.

A. SHARP, *Marshal.*

5 *Defendant's Pleas. Filed Apr.* 3, 1877.

In the Supreme Court of the District of Columbia.

CHAUNCEY D. SPAIDS
vs. } At Law. No. ——.
DENNIS N. COOLEY.

And now comes the defendant in the above-entitled cause, and for plea to plaintiff's declaration says he never was indebted as alleged.

And for further plea to said declaration the defendant says that the alleged cause of action did not accrue within three years before this suit.

WILLIAM A. COOK,
Att'y for Def't.

Joinder and Replication. Filed May 4, 1877.

In the Supreme Court of the District of Columbia.

SPAIDS
vs.
COOLEY. } At Law. No. 16894.

6 1. Upon the defendant's first plea the plaintiff joins issue.

2. To the second plea he says that the defendant promised to pay the debt named in the declaration within three years next before the commencement of this suit.

S. S. HENKLE,
Att'y for Pl't'ff.

Note of Issue. Filed Sep. 25, 1877.

In the Supreme Court of the District of Columbia.

SPAIDS
vs.
COOLEY. } 16894.

CHAUNCEY D. SPAIDS *vs.* DENNIS N. COOLEY.

S. S. Henkle, att'y for pl't'ff.
Wm. A. Cook, " " def't.
Last pleading filed May 4, 1877.

7 *Motion for Commission. Filed Dec.* 15, 1879.

In the Supreme Court of the District of Columbia, the —— day of December, 1879.

CHAUNCEY D. SPAIDS
vs.
DENNIS N. COOLEY. } At Law. No. 16894.

The plaintiff moves the court for the appointment of John N. Robertson, Esq., justice of the peace of Algonac, county of St. Clair, and the State of Michigan, as a commissioner to take the testimony of Joseph E. Spaids, a witness in behalf of the plaintiff.

S. S. HENKLE,
Att'y for Pl't'ff.

Motion granted Dec'r 15, 1879.

By the court: A. W.

Court Proceedings.

8 Proceedings before the supreme court of the District of Columbia, holding a special term, and circuit court number one,

in and for said District, commencing on the third Monday, 20th day of October, 1879.

MONDAY, *December* 15, 1879.

Session resumed pursuant to adjournment, Wylie, justice, presiding.

CHAUNCEY D. SPAIDS, Pl'ff, vs. DENNIS N. COOLEY, Def't. } At Law. No. 16894.

On motion of the plaintiff, by his attorney, Mr. Henkle, it is ordered that a commission issue to John N. Robertson, Esq'r., a justice of the peace of Algonac, St. Clair county, and State of Michigan, to take the testimony of Joseph E. Spaids, a witness for the plaintiff, on the interrogatories and cross-interrogatories filed herein, to be read in evidence on the trial of this case.

9 *Court Proceedings.*

Proceedings before the supreme court of the District of Columbia, holding a special term, and circuit court number one, in and for said District, commencing on the fourth Monday, twenty-sixth day of January, 1880.

MONDAY, *January* 26, 1880.

By order of MacArthur, justice, one of the justices of said court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * *

TUESDAY, *March* 2, 1880.

Session resumed pursuant to adjournment, MacArthur, justice, presiding:

CHAUNCEY D. SPAIDS, Pl'ff, vs. DENNIS N. COOLEY, Deft. } Cal. 153. At Law. No. 16894.

Now comes here as well the plantiff, by his attorney, Mr. Henkle, as the defendant, by his attorney, Mr. Cook, and a jury of good and lawful men of this District, to wit:

10 James A. K. Moore, James A. Shaw, George K. Ashley, John S. Pexton, William H. Brown, William P. Parke, Charles F. Mosely, Jonathan D. Cathell, Henry J. McLaughlin, Charles W. Sherwood, William A. Davidson, and Edward Devlin, who, being duly sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

* * * *

WEDNESDAY, *March* 3, 1880.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

CHAUNCEY D. SPAIDS, Pl'ff,
vs.
DENNIS N. COOLEY, Def't.
} At Law. No. 16894. Cal. 153.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court to-morrow.

* * * *

THURSDAY, *March* 4, 1880.

Session resumed pursuant to adjournment, MacArthur, justice, presiding.

11 CHAUNCEY D. SPAIDS, Pl'ff,
vs.
DENNIS N. COOLEY, Def't.
} At Law. No. 16894. Cal. 153.

Now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find the issue in favor of the defendant; therefore, it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and recover against the plaintiff the costs of his defence, taxed at $16.10, and have execution thereof.

Order for Noting Appeal. Filed Mar. 11, 1880.

In the Supreme Court of the District of Columbia, the 11 day of March, 1880.

CHAUNCEY D. SPAIDS
vs.
DENNIS N. COOLEY.
} At Law. No. 16894.

The clerk of said court will please note an appeal in this case to general term.

S. S. HENKLE,
Attorney for Spaids.

12 *Motion for New Trial on Exceptions. Filed Mar.* 12, 1880.

In the Supreme Court of the District of Columbia.

CHAUNCEY D. SPAIDS
vs.
DENNIS N. COOLEY.
} At Law. No. 16894.

Now comes the plaintiff, by his attorney, and moves the court for a new trial in the above-entitled cause, on the exceptions taken to the rulings of the court at the trial of the cause, and the instruction of the court to the jury.

S. S. HENKLE,
Att'y for Pl'tf.

Bill of Exceptions. Filed May 7, 1880.

In the Supreme Court of the District of Columbia.

CHAUNCEY D. SPAIDS
vs. } At Law. No. ——.
DENNIS N. COOLEY.

13 Be it remembered that at the trial of this cause, before the Hon. Arthur McArthur, one of the justices of this court, holding the circuit court known as No. 1, the plaintiff, to sustain the issue on his part, offered evidence tending to show that some time in December, 1866, he became acquainted with one John A. Hudnall, who had a claim against the United States for cotton captured by the Army during the war of the rebellion, the proceeds of which had gone into the Treasury of the United States. That said Hudnall had no means to employ counsel, and applied to him to undertake the collection of his, said Hudnall's, claim against the United States. That the plaintiff agreed to do so for a contingent fee of 30 per cent. of the amount to be recovered. That plaintiff thereupon associated with himself one Joseph Parrish, to whom he agreed to give one-fourth of the said fee if he could assist him 14 in the collection of said claim. That neither the said Parrish nor the plaintiff being a lawyer, they concluded to employ the defendant to prosecute the said case in the United States Court of Claims. That the defendant was absent from the city at the time. The contract made by the plaintiff with Hudnall was in writing, and the plaintiff thinks he inserted the name of the defendant as the contracting party with Hudnall at the suggestion of said Parrish or one Weed, and because the plaintiff was not an attorney-at-law. That the plaintiff and said Parrish procured the form of a petition for instituting a suit in the Court of Claims and prepared a petition, and had it printed and filed according to the rules of the Court of Claims, signing the name of the defendant to said petition as the attorney of record without his knowledge or consent. That the plaintiff proceeded at once, under the rules of the said court, to take some testimony in the case on behalf 15 of the claimant. He employed Judge Merriman, a competent lawyer, to assist him in taking the testimony. That the case was partly prepared for trial before the return of the defendant to the city, and when he came the plaintiff and said Parrish called upon him and informed him what they had done, and he approved of it and agreed to take charge of and prosecute the said case. That Parrish said to the defendant that, if successful, he could have a fee of five thousand dollars, which the defendant said would be entirely satisfactory. They then left the agreement made with Hudnall with the defendant. That, subsequently, the defendant said to the plaintiff that the contract did not provide for making the fee a lien upon the judgment which might be recovered, and he wanted Hudnall to come and endorse this stipulation on the agreement. The defendant afterwards took into partnership 16 W. Penn Clark, and the firm of Cooley & Clark did go on with

the case, and prosecute it to judgment, recovering about $44,000, which was paid to said Clark; that the money paid to said Clark was about $44,000. And the plaintiff demanded from the defendant his share of the fee which defendant, who was about leaving for his home in Iowa, said he had instructed his partner Clark to retain and not pay over any of the money until the plaintiff had been settled with. That said Clark did not pay him any part. The fee retained amounted to about eleven thousand dollars. The plaintiff also gave testimony tending to show that the defendant had on several occasions promised to pay the plaintiff his share of said fee, and once in the city of Chicago, within three years before the commencement of this suit, had promised to pay said plaintiff, but that he had not done so. He testified, on cross-examination, that when Cooley returned he approached him and told him what the arrangement was between him and Parrish; that Parrish was to have one-fourth of his fee out of which he was to pay Cooley. That Cooley said that was satisfactory and he would go on and prosecute the claim. That was the arrangement made between him and Cooley. And the plaintiff further testified that he rendered no services in the case at the request of Cooley or Clark, and rendered none at all after his first conversation with Cooley about it.

And the plaintiff further, in support of the issue on his part,
offered to read the deposition of one Joseph Parrish, and pro-
17 ceeded to read the 7th interrogatory and answer, as follows:

"7th. State what you know, if anything, in reference to a contract between the plaintiff Spaids and said Hudnall, with regard to the collection of Hudnall's claim against the Government?"

"7th. I understood from Mr. Hudnall and Mr. Spaids (both) that Mr. Hudnall had made a contract with him (Spaids) to prosecute and collect the said claim through the Court of Claims. Mr. Spaids asked me in reference to a suitable attorney. I recommended the defendant, Dennis N. Cooley. He was absent from his office at that time, and, as I understood, was absent at his home in Iowa. We saw a person in the office, apparently in charge, and a petition in the case was prepared, I cannot remember by whom. (At this point counsel for the defendant objects to conversation which occurred be-
tween Spaids and witness to the person referred to in Cooley's
18 absence.) I presume the petition was filed. I know that
Mr. D. N. Cooley subsequently prosecuted the case to a conclusion in company with Mr. Clark, and that they collected the money, as Mr. Hudnall informed me, although they did not get the amount they expected."

To the reading of which the defendant, by his counsel, objected and the court thereupon sustained the said objection, so far as it relates to the conversations of the deponent with Spaids and Hudnall in regard to their contract with Cooley, and refused to allow that part of their answer to be read.

To which ruling the plaintiff then and there excepted, for the reason that it was then too late, at the trial, to make the objection, and the justice noted the exception upon his minutes before the case was submitted to the jury. And the plaintiff prayed the court to sign and seal this his first bill of exceptions, which is done accordingly, *nunc pro tunc*, this 7th day of May, 1880.

ARTHUR MacARTHUR, *Justice*. [SEAL.]

19 And in the course of the trial, and to further prove the issues on his part, the plaintiff offered the paper purporting — a deposition of one Joseph E. Spaids, hereto attached and marked "A" and made a part of this bill of exceptions, to which the defendant, by his counsel, objected. And the court sustained the objection and refused to permit the said deposition to be read to the jury, and ruled it out because of its informality, to which ruling the plaintiff excepted. And the justice noted the exception upon his minutes before the case was submitted to the jury. And the plaintiff prayed the court to sign and seal this his second bill of exceptions, which is done accordingly, *nunc pro tunc*, this 7th day of May, 1880.

ARTHUR MacARTHUR, *Justice*. [SEAL.]

The defendant then, to maintain the issue on his part, introduced
testimony tending to prove: In the latter part of 1866 the
20 defendant opened an office for the practice of law in the city
of Washington. That he was absent from the city from some
time in December, 1866, until the first week in February, 1867,
when he returned to the city. That shortly after his return the
plaintiff (Spaids) and J. W. Parrish called at his office; that he had
no prior acquaintance with the plaintiff, but that he had known
Parrish, having sold to him a dwelling house. That they stated to
the defendant that they had a case for him in the Court of Claims;
they stated the case to him, and he said it seemed like a good case.
They showed him a written contract with Hudnall, the claimant in
the case, in which his name was used as a contracting party with
Hudnall. By this contract Hudnall agreed to pay a contingent fee
fee of thirty per cent. of the sum that might be recovered for
him. Parrish told the defendant that he could have a fee of
five thousand dollars out of it in case of success; that the
21 defendant said that that would be satisfactory. He was just
commencing the practice of law in the city of Washington
and had not before had a case in the Court of Claims. That he told
the plaintiff and Parrish to send Hudnall to see him. That upon
examining the contract he found that it did not contain a provision
for making the fee a lien upon the judgment that might be recovered,
and he asked Hudnall to endorse such a stipulation upon the
agreement, which he declined to do, claiming that the plaintiff had
deceived him, and told him that he could get a judgment at the
term of the court then in session, and declined to have anything
further to do with the contract; and their negotiations ended and
were not renewed. That afterwards Spaids and Parrish called upon
him, and he informed them what had taken place between himself
and Hudnall, and that Hudnall had declined to stipulate that
22 the fee should be made a lien upon the judgment, and he declined
to have anything to do with the case unless he did.

That he never had any further conversation with Parrish or Spaids upon the subject of Hudnall's case until after the recovery of the judgment. That the defendant afterwards associated with himself as partner Mr. W. Penn Clark, and that they did business under the firm name of Cooley and Clark. That Mr. Clark prepared a contract with Hudnall, between Hudnall and the firm of Cooley and Clark, by which Hudnall agreed to pay them a contingent fee of twenty-five per cent. for the collection of his claim, and stipulated that it should be a lien upon the judgment recovered. That the contract with Cooley and Clark, although made about the first of May, was dated back to the time of the filing of the original petition. That he never had any further conversation with either Parrish or Spaids after the contract between Hudnall and Cooley
23 & Clark until after judgment was rendered. It further ap-
pears from the evidence of the defendant that the original contract with Hudnall had been delivered up to him by Clark after the new contract was made, and the defendant testified that the contract with Cooley and Clark was approved by him.

And afterwards the defendant testified that he never agreed with the plaintiff to prosecute said claim under the contract which the plaintiff claimed to have made with Hudnall, but told Spaids and Parrish to have Hudnall come and see him. That when he saw Hudnall he claimed that Spaids and Parish had told him he could get a judgment at that term of the court, and that was the inducement to him to enter into the contract with Spaids. That defendant told Hudnall that he could not get judgment at that term, and wanted him to stipulate that the fee should be a lien upon the judgment, but he refused, and defendant refused to prosecute the
24 claim, and told Parrish and Spaids that the whole thing was
at an end. That soon afterwards he took Clark into partnership with him, and Clark made a contract in name of the firm, some three or four months after the conversation with Spaids, to prosecute the claim for twenty-five per cent., to be a lien upon the judgment, and the claim was prosecuted under that contract, and the money received. The testimony having been concluded on both sides. The plaintiff prayed the court to instruct the jury as follows:

If the jury find from the evidence that Spaids made an agreement with Hudnall to prosecute the case for the sum of thirty per cent., and that he made a contract, in the name of Cooley, with Hudnall, and caused a petition to be filed in the Court of Claims, and took a part of the testimony, or procured it to be done, in pursuance of said ageeement, and that the said Cooley was then absent from Washington, but that when he afterwards returned Spaids and Parrish called upon said Cooley and gave him the said contract, and he
25 agreed to prosecute the case to judgment for $5,000, but that
he afterwards objected to go on with the case unless Hudnall should endorse a stipulation upon the contract giving him a lien upon the judgment which might be recovered for his fees. And they further find that Hudnall refused to make this stipulation at that time, but that he shortly afterwards made a new contract with

Cooley and Clark containing this stipulation for a lien, and agreeing to give Cooley and Clark twenty-five per cent. for prosecuting said case, and that this contract was dated back to the commencement of the suit in the Court of Claims, and that said Cooley did not at any time, nor at any time prior to the judgment, inform the said Spaids that he had made a new contract in the name of Cooley and Clark, or any new contract whatever with the said Hudnall, the said de-
fendant is liable to the plaintiff for whatever share of the fee
26 they may find from the evidence he was entitled to receive
by virtue of his original agreement with the said Cooley, subject to the reduction of the amount of the fee from thirty per cent. to twenty-five per cent., which was the amount stipulated for in the contract with Cooley and Clark.

Which instruction the court refused to give; to which refusal to instruct as prayed the plaintiff then and there excepted, and the justice noted the exception upon his minutes before the case was submitted to the jury.

And the plaintiff prayed the court to sign and seal this his third bill of exceptions, which is done accordingly, *nunc pro tunc*, this 7th day of May, 1880.

ARTHUR MACARTHUR, *Justice*. [SEAL.]

And whereas the defendant had pleaded the statute of limitations, and the plaintiff replied a new promise within the three
years preceding the commencement of this suit. The plain-
27 tiff, to support this issue on his part, did testify in chief, as
follows:

"I next saw Cooley—well, I have seen him so many times I cannot remember when the next time was; I saw him twice in Chicago. Yes, I went to Dubuque, Iowa; once to see him, but did not see him; he had gone out of town; I don't remember the date; it was before the big fire in Chicago, though I cannot state whether it was the very next time I saw him or not. My recollection is that I next saw him in 1874. Well, I cannot exactly fix the time; it was during the oyster season, I remember; either in the spring or fall. Well, from about the first of September to the latter part of April or the first of May; mean between the first of September, 1874, and the last of April of first of May, 1875. I met him in the street with his satchel in his hand. He said he was going to Washington. I asked him if he intended to pay me that money. He replied, 'You should have had your money long ago, but my partner, Col. Clark,
is behaving very badly; he has got a portion of the money
28 into his hands and refuses to pay you.' He said: 'I am now
on my way to Washington; I am going to get the best settlement I can from Clark, and upon my return I will positively pay you.' He said further that he did not know but he would have to pay me himself."

And upon cross-examination he further testified:

"Remembers quite distinctly. I asked Cooley if he was going to

pay me that money in the Hudnall case, or whether he was going to force me to further proceedings at law. He said: 'You ought to have had that money long ago; it would have been paid, but Clark is behaving very badly in the matter; he has part of it in his hands and refuses to pay you. I do not know but what I will have to pay you myself.' That is as near precisely what he said as language can make it. I think, I cannot be much mistaken, that was as near as possible the very language he used. I said to Cooley: 'Are you
going to pay me that money due me in that Hudnall case, or
29 are you going to force me to further legal proceedings to get
it?' He said: 'Mr. Spaids, you ought to have had your money long ago, but Mr. Clark is behaving very badly in the matter; he has a portion of the money in his hands and refuses to contribute towards paying you, and I do not know but that I will have to pay you myself.' "

And this was all the evidence offered by the plaintiff in support of the new promise.

After overruling the prayer of the plaintiff the court instructed the jury that the plaintiff had not offered sufficient evidence of a new promise, on the part of the defendant, to take the case out of the statute of limitations, to be submitted to them, and directed them to return a verdict for the defendant. To which instruction and direction of the court the plaintiff, by his counsel, excepted, and the presiding justice noted the said exception upon his minutes before the case was submitted to the jury. And the plaintiff prayed the court to sign and seal this his fourth bill of exceptions, which is accordingly done, this 7th day of May, 1880, now for then.

ARTHUR MacARTHUR, *Justice*. [SEAL.]

30 "A."

In the Supreme Court of the District of Columbia, the 27 day of December, 1879.

CHAUNCEY D. SPAIDS
vs. No. 16894. Law Docket.
DENNIS N. COOLEY.

The President of the United States to John M. Robertson, Algonac, Saint Claire county, Michigan, Greeting:

Know you that, in confidence of your prudence and fidelity, you have been appointed, and by these presents you are invested with power and authority to examine Joseph E. Spaids as a witness for the plaintiff in the above-entitled cause, upon the interrogatories annexed to this commission; and, therefore, you are hereby commanded, at a certain day and place, or certain days and places, to be appointed by you, to cause said witness to come before you, and then and there examine him, on oath or affirmation, upon the said
interrogatories, and reduce his testimony into writing, to be
31 signed by said witness; and, having done so, annex the same
to this writ, closed up under your seal, and make return thereof into said court with all convenient speed.

Witness D. K. Cartter, chief justice.
[SEAL.] R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk*.

In the Supreme Court of the District of Columbia.

CHAUNCEY D. SPAIDS
vs. } At Law. No. 16894.
DENNIS N. COOLEY.

Interrogatories to be propounded to Joseph E. Spaids, a witness on behalf of the plaintiff in the above-entitled case, by John M. Robertson, Esq., justice of the peace, a commissioner appointed by the said court for that purpose.

1. What is your name, age, and place of residence?
2. Of what relation are you to the plaintiff?
3. Are you acquainted with the defendant Dennis N. Cooley?
32 4. When and under what circumstances and where you first met him? What took place between you at that time?
5. When and under what circumstances and when did you next see him?
6. State fully and particularly the conversation which took place between your father, the plaintiff, and the defendant Cooley at that time?

Answers to Interrogatories Hereunto Annexed.

STATE OF MICHIGAN,
County of St. Clair, } *ss:*

On this thirty-first day of December, A. D. 1879, before me, the undersigned, a justice of the peace in and for said county, personally appeared Joseph E. Spaids, of Algonac, in said county, who, being by me duly sworn according to law, doth depose and say, in relation to the case of Chauncey D. Spaids *versus* Dennis N. Cooley, hereunto annexed.

Said deponent states as follows:

No. 1. My name is Joseph E. Spaids; my age is forty-four years; and residence is Algonac, St. Clair county, Michigan.

No. 2. That the said Chauncey D. Spaids is my father.

33 No. 3. And am acquainted with the said Dennis N. Cooley defendant.

No. 4. I first met the said Cooley at Chicago, in the State of Illinois, about the year 1870; that I was appointed a deputy sheriff to serve a process of a court, to wit, a summons upon the said Cooley in a suit then and there commenced by said Spaids against said Cooley; that I did serve said summons upon said Cooley.

No. 5. I next saw the said Cooley at Chicago, aforesaid, in year 1874. I met him on Randolph street, of said city, going towards the Pittsburgh and Fort Wayne depot. I then went into an office where my father, the plaintiff, was, and informed him that said Cooley was in the city. He asked me where he (said Cooley) was

We stepped out of said office onto the street; said Cooley being in sight, I pointed him out to said Spaids. We both proceeded down to said Cooley, and after the usual compliments were exchanged between said Spaids and Cooley the following conversation took place:

No. 6. The said Spaids asked said Cooley if he was going
34 to pay him (said Spaids) the money due him and now in his (said Cooley's) hands, in the Hudnall case, without my being obliged to resort to legal proceedings; to which said Cooley replied as follows: Mr. Spaids, you ought to have had your money long ago, for you got the case and done most of the work in the case before I (Cooley) knew much about it; but my partner, Mr. Clark, is acting very bad in the matter, and I don't know but what I will have to pay the whole amount myself; but I am now on my way to Washington, and while there I will try and get the best settlement I can with Clark, and on my return from there, which will be in about ten days, you shall have your money, if I have to pay it all myself.

I paid particular attention to said conversation, as I had often heard my father speak of said case both before and after I served said summons in 1870.

And further saith not.

JOSEPH E. SPAIDS.

35 Taken, subscribed, and sworn to before me, the day and year first above written.

JOHN M. ROBERTSON,
Justice of the Peace.

STATE OF MICHIGAN, }
County of St. Clair, } *ss:*

I, Horace Baker, clerk of said county and clerk of the circuit court for the county of St. Clair, which is a court of record, having a seal, do hereby certify that John M. Robertson, whose name is subscribed to the certificate or jurat of the annexed instrument, and therein written, was, at the time of taking such jurat, a justice of the peace in and for said county, duly commissioned and qualified, and duly authorized to take the same; and further, that I am well acquainted with the handwriting of such justice, and verily believe that the signature to the said jurat is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court and county, at Port Huron, this 2d day
36 of January, A. D. 1880.

[SEAL.]

HIRAM BAKER, *Clerk,*
By G. W. BLACK, *Deputy.*

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, in general term, commencing on the 4th Monday, 27th day of September, 1880.

Present: Chief Justice Cartter and Justices Wylie and Hagner.

* * * * * * *

WEDNESDAY, *Dec.* 15, 1880.

Session resumed pursuant to adjournment. Present: Chief Justice Cartter and Justice Wylie.

CHAUNCEY D. SPAIDS
vs.
DENNIS N. COOLEY.
} 16894. Law.

Argued by Mr. DuHamel, behalf of plaintiff, appellant, and by W. A. Cook, behalf of defendant, appellee, until adjournment.

* * * * * * *

37 FRIDAY, *December* 17*th*, 1880.

Session resumed pursuant to adjournment.
Present: Chief Justice Cartter and Justice Wylie.

CHAUNCEY D. SPAIDS
vs.
DENNIS N. COOLY.
} 16894. At Law.

Argument resumed by Mr. Cole, behalf of defendant, and concluded by Mr. Henkle, behalf of plaintiff, and cause submitted.

* * * * * *

THURSDAY, *December* 23, 1880.

Session resumed pursuant to adjournment.
Present: Chief Justice Cartter and Justice Wylie.

CHAUNCEY D. SPAIDS
vs.
DENNIS N. COOLEY.
} 16894. Law.

This cause coming on further to be considered, the court, by Justice Wylie, verbally, in opinion pronounced, directs the judgment at special term to be affirmed.

38 In the Supreme Court of the District of Columbia, the 9th day of November, 1881.

CHAUNCEY D. SPAIDS
vs.
DENNIS N. COOLEY.
} At Law. No. 16894. In Error.

Know all men by these presents, that we, Ehud N. Darling and John A. Baker, are bound unto the above-named Dennis N. Cooley in the sum of two hundred dollars, to be paid to the said Dennis N. Cooley, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our, and each of our, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this ninth day of November, 1881.

Whereas the above-named Chauncey D. Spaids has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Chauncey D. Spaids shall prosecute his said writ to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

EHUD A. DARLING. [SEAL.]
JNO. A. BAKER. [SEAL.]

Sealed and delivered in presence of—
JOSEPH P. FALLON.
WM. E. CLARK,
Witness to John A. Baker's signature.

Approved.
W. S. COX, *J.*

39 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the records and proceedings, as also in the rendition of a judgment in a plea, which is in the said court, before you, between Chauncey D. Spaids, plaintiff, and Dennis N. Cooley, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears: And it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 18th day of November, in the year of our Lord 1881, and of the Independence af the United States the 106th.

[SEAL.] R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To Dennis N. Cooley:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Chauncey D. Spaids is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f Just.

I acknowledge service.

WILLIAM A. COOK,
Att'y for Def't.

[Endorsed:] No. 16894. Chauncey D. Spaids *vs.* Dennis N. Cooley. Writ of error.

40 Authentication of Record.

Clerk's Certificate.

Clerk's Office,
Supreme Court of the District of Columbia.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 23rd day of November, 1881.

[seal.]
R. J. MEIGS, *Clerk,*
By W. E. WILLIAMS,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 23rd day of Nov., 1881.

D. K. CARTTER, [seal.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 23rd day of November, 1881.

[seal.]
R. J. MEIGS, *Clerk,*
By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: Dist. of Col. supreme court. No. 171. Chauncey D. Spaids, pl'ff in error, *vs.* Dennis N. Cooley. Filed 3rd December, 1881.

1

113-275

FILED
JAN 14 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

October Term, 1884.

No. 171.

CHAUNCY D. SPAIDS, Plaintiff in Error,
v.
DENNIS COOLEY.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief of S. S. Henkle, Counsel for Plaintiff in Error

Supreme Court of the United States,

October Term, 1884.

No. 171.

CHAUNCY D. SPAIDS, Plaintiff in Error,
v.
DENNIS COOLEY.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief of S. S. Henkle, Counsel for Plaintiff in Error

The case is stated in the Bill of Exceptions:

1st. The first Exception relates to the reading of the answer to the 7th question in the deposition of one Joseph W. Parrish, a witness for the plaintiff. It will be seen that the objection of the counsel for the defendant was to the witness relating the conversation between the witness and the plaintiff and "a person" in the office of Mr. Cooley, who was absent at his home in Iowa, the objection was that Mr. Cooley was not to be charged by what was said by the person referred to in his absence, and this objection would probably be well taken, and the court will see that the witness did not state what was said by the person in Mr. Cooley's office, but the court on its own motion ruled out the conversation between Hudnal and Spaids with regard to their contract (which in the exceptions is spoken of as the contract with Spaids.) This was not objected to by the defendant, and if it had been, the objection should not have been sustained, as the right to object was waived by the failure to make it before the trial; and if the defendant could not make it, the court could not for him.

2d Exception. The plaintiff offered to read in evidence the deposition of one Joseph E. Spaids, taken upon a commission issued from this court. It was objected to by the defendant's counsel, upon the ground that it was informal, and the court sustained the objection and excluded the deposition. The deposition is set out in full in the record, and the court will see that while perhaps in form it is not so artistic as it might be, yet all the requisites of the law are complied with. But if it were objectionable on account of want of form, it was too late to first make the objection upon the trial of the cause. The objection should have been taken on the examination of the witness or upon motion to suppress the deposition before the trial.

York Company *v.* Central R. R. Co., 3 Wall., 108.
Buddicumb *v.* Kirk, 3 Cranch, 297.
Peck *v.* Lambert, 12 How., 354.
Shute *v.* Thompson, 15 Wall., 158.
Winans *v.* N. Y. and Erie R. R. Co., 21 How., 100
Doane *v.* Glenn, 21 Wall., 35.
Claxton *v.* Adams, 1 McArthur, 498.

This deposition was of great materiality, as it proved an express and unequivocal promise to pay within three years.

It seems to me too clear for argument that the court erred in excluding this deposition.

3d. The 3d Exception was to the ruling of the court in refusing to give the instruction prayed by the plaintiff, as the court assigned no reason and the counsel for the defendant suggested none, I am at a loss to perceive wherein the prayer is obnoxious to any valid legal objection, and will not, therefore, attempt to anticipate the objection that may be made to it with my present lights. I think the court erred in rejecting it.

STATUTE OF LIMITATIONS.

4th Exception. The court charged the jury that the plaintiff had not offered sufficient evidence of a new promise on the part of the defendant to take the case out of the statute of limitations, to be submitted to them, and directed them to return a verdict for the defendant; to which ruling the plaintiff excepted.

The exception contains an abstract of the plaintiff's testimony on that point.

In his examination in chief, he states a *positive unconditional promise to pay.*

The charge of the court that sufficient evidence has not been offered to be submitted to them, is equivalent to a demurrer to the evidence.

The party who demurrs to evidence seeks thereby to withdraw the consideration of the facts from the jury, and is bound, therefore, not only to admit the truth of the evidence as given, but every fact which that evidence may legally conduce to prove in favor of the other party, and if upon any view of the facts, the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him.

Thornton *v*. The Bank of Washington, 3 Pet., 40.
Chenowith *v*. Haskill's Lessee, Ibid., 96.

If there is no evidence whatever to sustain the declaration it is the duty of the court to instruct the jury to find against the plaintiff; but if there is any evidence *tending* to prove the averment, its value must be submitted to the jury with proper instructions.

Drakeley v. Greeg, 8 Wall., 268.
Otterback v. Brown, 2 McArthur, 545.
U. S. v. Laub, 12 Pet., 5.
Richardson v. Boston, 19 How., 263.

ACKNOWLEDGMENT OF DEBT AND NEW PROMISE.

The act of limitations in this case is the Statute of Maryland of 1715, Thompson's Dig. 287.

In its construction I presume this court will adopt the construction given to it by the Court of Appeals of Maryland.

In the case of Oliver v. Gray, 1 H & G. 204, which is a leading case, the Court of Appeals after reviewing the decisions of the English courts upon the Statute of the 21 James, 1 ch. 16, p. 216, says: "Taking the Act of Limitation, then as we find it, operating upon the remedy only and not as an extinguishment of the debt, and feeling the necessity for a more definite and certain understanding of the effect of the adopted construction, than can easily be collected from particular cases, we will endeavor not to reconcile the various decisions that are to be found in the books on this subject, but to lay down some general rules for the practical application of the principles they establish; that the act does not extinguish the debt, but only bars the remedy, and that an acknowledgment by the defendant of the debt or a promise to pay it within the time prescribed, is sufficient to revive the action."

A brief summary of the rules which follow:

1st. "The suit is brought on the original cause of action and not on the new promise or acknowledgment which only has the effect to restore the remedy."

2d. "It need not be an absolute and unconditional, but a conditional promise is sufficient, and in such case it is incumbent on the plaintiff to show at the trial, either a performance of the condition, or a readiness to perform it." And here the court cites a number of cases giving examples of conditional promises which have been held good.

3d. "An acknowledgment to take the case out of the Act of Limitations, must be of a present subsisting debt unaccompanied by any qualification or declarations, which if true would exempt the defendant from a moral obligation to pay. For the law will not raise an assumpsit, or imply a promise to pay, what in equity and good conscience a man is not bound to pay." And here illustrations are given.

4th. "An acknowledgment of the debt, with a naked refusal to pay, or a refusal accompanied with an excuse for not paying it, which in itself implies an admission that the debt remains due, and furnishes no real objection to the payment of it, is sufficient."

5th. Any unqualified acknowledgment of a present subsisting debt or acknowledgment, with no other excuse for not paying it than a reliance on the Act of Limitation, is sufficient to take it out of the act."

6th. "The acknowledgment of the debt may be in whole or in part."

7th. "It is sufficient if it be after the bringing of the suit," &c.

8th. An admission that the sum claimed has not been paid, is not sufficient without some further admission or other proof that the debt once existed."

9th. The acknowledgment need not be made to the plaintiff himself, but may be made to anybody else."

10th. " What kind of promise or acknowledgment is sufficient to take a case out of the Act of Limitations, is for the court to decide; and the evidence offered to prove such promise or acknowledgment *is proper to be submitted to the jury as in other cases* under the direction of the court."

This decision was made in 1827, and it is believed that the Maryland courts have followed the principles laid down in construing the Act of Limitation to the present time. In the new edition of the earlier Maryland Reports, which is now being published in the notes to this case are collected all the Maryland cases.

Decisions of the Court of Appeals of Maryland, Vol. 11-12-14, 1 H & G., 142.

"To remove the bar of limitations it is not necessary that the creditor, at the time of the new promise, should exhibit the evidence of his claim, or state the precise nature or amount thereof. These facts are for the jury who must find to what debt the new promise related," &c.

Guy v. Tams, 6 Gill, 82.

An acknowledgment of the debt, within three years without any refusal to pay, or excuse for not paying, will take a case out of the statute.

Johnson v. Evans, 8 Gill, 155.

I do not understand that the foregoing doctrines cited from the Maryland courts are in conflict with the decision of this court in the case of Bell v. Morrison, 1 Pet., 355; but if the court shall discover any antagonism, it will be remembered that the courts are construing their own statute, and this court in Bell v. Morrison was construing a Kentucky Statute, and I suppose the court will in this case feel constrained to follow the Maryland courts, as they did in that the Kentucky courts.

On page 360 this court says "The Statute of Limitations of Kentucky is substantially the same with the Statute of 21 James, chapter 16, with the exception that it substitutes the time of five years instead of six. The English decisions have therefore been resorted to upon the present occasion as illustrative of the true construction of the statute, and in this view are doubtless entitled to great consideration. They are not, however, and cannot be considered as conclusive authority upon the construction of the statute passed by a State upon a like subject; for this justly belongs to the local tribunals, whose rule of interpretation must be presumed to be founded upon a more just and accurate view of their own jurisprudence, than those of any foreign tribunal, however respectable. If therefore, upon examination it shall be found that the doctrine of the Kentucky courts on this subject are inconciliable with those deduced from the statute of James, this court would, in conformity with its general practice, follow the local law, and administer the same justice which the State court would administer between the same parties."

Again on page 366, the court after reviewing the decisions of the Kentucky courts, says: "These are all the decisions which we have met with in the Kentucky Reports on this point. They evince a strong disposition in the courts of that State to restrict within very close limits, every attempt to revive debts by implied promises resulting from acknowledgments and other confessions by parol. It is our duty to follow out the spirit of these decisions, so far as we are enabled to gather the principles on which they are founded, and to apply them to the case at bar."

In conclusion, on page 375 the court says: "Upon the whole, it is our judgment that there is no error in the decision of the Circuit Court, and it ought to be affirmed. It is however, to be understood that this opinion thus expressed is not unanimous, but of the majority of the court; and as it appeared from the preceding reasoning, it has been principally, although not exclusively influenced by the course of the decisions in Kentucky upon the subject."

ASSIGNMENT OF ERRORS.

The court below erred in its rulings found in the 1st, 2d, 3d and 4th, Exceptions, found in the Bill of Exceptions.

S. S. HENKLE,
Counsel for Plaintiff in Error.

113-278

Office Supreme Court U. S.
FILED.
JAN 15 1885
JAMES H. McKENNEY,
CLERK.

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, A. D. 1884.

CHAUNCEY D. SPAIDS, Appellant,
vs.
DENNIS N. COOLEY, Appellee.
No. 171,

BRIEF AND ARGUMENT FOR THE APPELLEE.

W. PENN. CLARKE,
Of Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1884.

CHAUNCEY D. SPAIDS, *Appellant,* *vs.* DENNIS N. COOLEY, *Appellee.*	No. 171.

Error to the Supreme Court of the District of Columbia.

BRIEF AND ARGUMENT FOR APPELLEE.

The facts on which this case arises, as stated by appellant and appellee, respectively, and as shown in the record, do not materially conflict, and are substantially as follows:

In December, 1866, one John A. Hudnall, who had a claim against the United States for the proceeds of cotton taken from him during the war, came to Washington for the purpose of prosecuting the same in the Court of Claims. He there became acquainted with Chauncey D. Spaids, the plaintiff herein, who agreed verbally with Hudnall to undertake the collection of said claim, for a contingent fee of thirty per cent. of the amount recovered. Spaids then associated with himself in the matter one Joseph Parrish, to whom he agreed to give one-fourth of said fee, for assisting in the collection. Spaids had a written contract prepared, and signed by Hudnall, by which the latter agreed to pay said thirty per cent. for the prosecution of the claim, and as neither Spaids nor Parrish were attorneys or lawyers, they inserted in the proposed contract the name of defendant, D. N. Cooley, who was a lawyer, and a member of the bar of the Court of Claims, as the sole contracting party with Hudnall. Spaids and Parrish then procured and filled out a form of petition for instituting suit in the Court of Claims, signed the name of Cooley to it as the attorney of record, filed it, and proceeded with Hudnall to take the depositions of certain witnesses in behalf of the claimant, Mr. Merriman, a lawyer, assisting to some extent.

These steps were all taken between December, 1866, and the first week of January, 1867, during a time when Cooley was absent from Washington, and without his knowledge, authority or consent.

Shortly after Cooley's return to Washington, Spaids and Parrish called upon him, and said they had a case for him in the Court of Claims, stating the case, informing him what they had done, and showing him the written contract, in which his name appeared as the contracting party with Hudnall, and by which Hudnall agreed to pay Cooley a contingent fee of thirty per cent. Parrish then told Cooley that, if successful, he could have a fee of five thousand dollars out of the case, which Cooley said would be satisfactory, but required that Hudnall should come and see him. Upon examining the proposed contract, Cooley found it did not provide that his fee should be a lien upon the judgment which might be recovered, and when Hudnall came to see him, Cooley requested Hudnall to endorse such a stipulation on the contract. This Hudnall refused to do, whereupon Cooley declined to go on with the case. The proposed contract was never signed by Cooley, but was delivered up to Hudnall, and this negotiation ended.

About three months afterwards, Cooley entered into partnership with W. Penn. Clarke, a lawyer, and a member of the bar of the Court of Claims, and Clarke afterwards made a new contract with Hudnall, providing that the firm of Cooley & Clarke should prosecute the claim, and should receive therefor a contingent fee of twenty-five per cent., which should be a lien on the judgment. The case was prosecuted under this new contract, by Cooley & Clarke, a judgment for about $44,000 recovered and collected, and the fee, about $11,000, retained by that firm.

Cooley had no further conversation with either Spaids or Parrish about the case, until after judgment was recovered. Spaids never rendered any services in the case, after his first conversation with Cooley, above referred to, and never at any time rendered any services in it at the request of either Cooley or Clarke.

Spaids brings this suit on the theory that, under the circumstances above detailed, he is entitled to the whole fee of about $11,000, deducting therefrom, however, the $5,000, which he testifies Parrish was to pay Cooley, out of Parrish's one-fourth of the fee.

To the declaration, which contains only the common counts, the defendant pleaded, (1) the general issue, (2) the statute of limitations. Plaintiff replied a new promise.

The appellee maintains (1) that appellant never had a valid original cause of action on which he could recover; (2) that his cause of action, if any he ever had, is completely barred by the statute of limitations, and no evidence, proper to go to a jury, was given of a new promise. If either of these positions is sustained by this Court, the judgment of the court below must be affirmed.

ARGUMENT.

I. NO EXPRESS CONTRACT WAS SHOWN IN EVIDENCE UPON WHICH SPAIDS CAN RECOVER AGAINST COOLEY IN THIS ACTION.

The only counts in the declaration upon which appellant could, in any view of this case, recover, are the counts, "*for* "*work done and materials provided by said plaintiff for said de-*"*fendant at his request;*" or the count, "*for money received by* " *the defendant for the use of the plaintiff.*"

He can only recover on either of these counts by proof of an express contract to pay him the amount specified in his declaration, or of circumstances from which the law would imply a promise to pay him that or some smaller sum.

The only cause of action Spaids pretends to have against Cooley, is stated in his testimony, and taking this statement, for the purpose of this argument, as true throughout, it furnishes no ground of recovery against Cooley.

1. The written paper, purporting to be a contract between Hudnall and Cooley, which Spaids procured Hudnall to sign, was not a contract. It could not become a contract until Cooley had signed, or at least assented to it. This all the evidence shows he never did. He objected to its terms, and required an additional and material stipulation, which Hudnall refused to make. Cooley then refused to sign the proposed contract, and the paper was delivered back to Hudnall. Both of those named as contracting parties repudiated it, and it became a mere nullity, on which no cause of action could arise in favor of any person. No authorities need be cited to show, that in order to make a valid contract, both parties must assent to all its terms. It is sufficient to point out that in this case both parties did not so assent.

2. Even if this had become a binding contract, Spaids could not maintain an action upon it, because he was not a

party to it, or named in it; and because it was expressly for attorney's fees, and Spaids was not an attorney.

The only theory upon which appellant seeks to recover in this action is, that the contract, while ostensibly between *Hudnall* and *Cooley*, was really between *Hudnall* and *Spaids*, entitling the *latter* to the contingent fee; and that the subsequent contract was, in fact, only a continuation or revival of the one which had been repudiated; that Cooley, in the first instance, and afterwards Cooley and Clarke, were in fact merely Spaids' representatives, trustees or figure-heads, put into the contract to enable Spaids to get a contingent attorney's fee, which he could not lawfully contract for in his own name; and that the fee subsequently received by Cooley and Clarke in equity belongs to Spaids.

That this action is really for attorney's fees admits of no dispute. Appellant testifies that he (Spaids) agreed with Hudnall to prosecute the claim for a contingent FEE of thirty per cent.; that he (Spaids) was to have the whole FEE; that he was to give Parrish one-fourth of his (Spaids) FEE, out of which Parrish was to give Cooley $5,000. (Rec., pp. 6, 7.)

There are several objections to this as a cause of action:

1. The new contract can in no sense be said to be a continuation, renewal or revival of the old one. The parties contracting, the amount of fees stipulated, and other terms, were essentially different. As the first proposal never became a contract, was repudiated, and became a nullity, there was nothing to be continued, revived or renewed.

2. Neither Spaids nor Parrish were attorneys, and they could not make a contract which would entitle them to sue for or recover attorney's fees. Since the statute 4 Henry IV, c. 18, requiring attorneys to be enrolled and sworn to execute their office truly, no case can be found in which an unqualified or unlicensed person has been held entitled to attorney's fees. The authorities to the contrary are numerous and uniform. (*Latham* v. *Hyde*, 1 C. & M., 128; *Pierce* v. *Whale*, 5 Barnewall & Creswell, 38, Comyn's Dig. Tit. Attorney; *Tedrick* v. *Hiner*, 61 Ill., 187.)

By numerous statutes, from 3 Jac. 1, c. 7, Sec. 2, down, unqualified persons have been prohibited from acting as attorneys at law; and, in England, by 2 Geo. 2, c. 23, it is made a penal offense for any person not an attorney at law, to act as an attorney, to sue out any writ or process, to commence, carry on, or defend, any action or proceeding in any court of record.

Appellant testifies that in order to avoid the consequences of his not being an attorney at law, (which would make his contract with Hudnall void,) at the suggestion of Parrish, or of one Weed, he inserted the name of Cooley, who was a lawyer, in their pretended contract; and also signed Cooley's name as attorney of record to a petition, which was filed in the Court of Claims, thus commencing the suit, after which the plaintiff went on to take testimony, etc. Appellant admits this was done without Cooley's knowledge or consent, but says that when he and Parrish afterwards called on Cooley and informed him what they had done, Cooley approved of it, and agreed to take charge of and prosecute the case. If by this appellant means, as we think he does, that Cooley was to go on, as the apparent attorney, but really as the representative or figurehead of Spaids, who was to be the real party in interest and entitled to the whole attorney's fee, then, we say this arrangement would be equally illegal. It would be wholly contrary to the policy of the law, to permit an unqualified and unlicensed person to use the name of a member of the bar as a cover for his illegal practice.

This course of procedure has been animadverted upon in numerous adjudged cases, from the earliest times. Among others is that in 2 Dowl & Ry. 64, in the matter of George Jacques; and in 3 Dowl & Ry. 260, in the matter of Thomas Clark, John Slee Isaacson and John Benjamin Brookes. The latter case is thus reported:

" The Court struck two attorneys off the roll for know-
" ingly permitting an unqualified person to practice as an
" attorney in their names, for his own profit, contrary to 22

"Geo. II, c. 46, and sentenced the unqualified person to be "imprisoned for three months in the prison of the court."

Independently of this statute, there seems to be no doubt that a contract whereby an unlicensed person seeks to entitle himself to attorney's fees, is void at common law.

II. SPAIDS CANNOT RECOVER UPON HIS THEORY THAT HE, AND NOT COOLEY OR COOLEY AND CLARKE, IS THE REAL CONTRACTING PARTY WITH HUDNALL, AND SO ENTITLED TO THE WHOLE CONTINGENT FEE. SUCH A CONTRACT WOULD BE VOID UNDER THE COMMON LAW DOCTRINES OF CHAMPERTY AND MAINTENANCE.

It is to be noted that Spaids nowhere testifies that Cooley contracted with Hudnall, and was to collect the claim and receive a contingent fee, which he would divide in some way with Spaids, or out of which he would pay Spaids.

Spaids expressly swore that he (Spaids) agreed to undertake the collection of Hudnall's claim against the United States, for a contingent fee of thirty per cent. of the amount to be recovered; that of this fee, he (Spaids) agreed to give Parrish one-fourth for his "assistance;" that when Spaids and Parrish called on Cooley, they stated what the arrangement was between Spaids and Parrish, viz: that Spaids should give Parrish one-fourth of the fee, out of which Parrish would pay Cooley $5,000, and that Cooley agreed to prosecute the case on this understanding. This Cooley denies; but independent of this denial, the statement is highly incredible. It is hard to believe that a sane attorney would agree to prosecute a case to judgment, collect the amount in cash from the United States Treasury, hand over the whole fee to a mere "drummer" or interloper like Spaids, and look to another interloper like Parrish, for his pay. But even if this statement of Spaids is true, it presents a contract or arrangement that was champertous and void. It would be "an unlawful maintenance of a suit, "in consideration of a bargain to have a part of a thing in "dispute," which Lord Coke pronounced an offence at common law, (2 Inst., 208, 9.)

The old authorities went much further; thus in Bac. Abr., title, "Maintenance," it is said:

> "Also it seems to be an act of maintenance to open evi-
> "dence to the jury, or to give evidence officiously, without
> "being called upon to do it, or to speak in a cause as one of
> "counsel with the party, *or to retain an attorney for him;* and
> "some have said that it is maintenance, even barely to go
> "along with him to enquire for a person learned in the law."
> Cro. Eliz., 755 Roll. Abr. 592.

Champerty is a common law offense, being the unlawful maintenance of a suit in consideration of some bargain to have some part of the thing in dispute, or some profit out of it.

Thurston v. *Percival*, 1 Pick., 416;
Key v. *Valtier*, 1 Ham., 132;
Rust v. *Varne*, 4 Litt., 417;
Brown v. *Beauchamp*, 5 Monr., 416.

An agreement that amounts to champerty cannot be supported, either in law or equity.

5 Johns Ch., 44;
Sayles v. *Tibbetts*, 5 R. I., 79.

And it is not essential to the offense of champerty that there be a suit commenced at the time the argument is made.

Rust v. *Lowe*, 4 Litt., 417.

It is true the rules on this subject have been greatly relaxed by modern decisions; and, in favor of attorneys at law, it is now held in many States, as well as by the Supreme Court of the United States, that a fair agreement for a contingent fee, for purely professional services, is valid and will be enforced.

Wright v. *Tebbitts*, 91 U. S. R., 252.
Stanton et al v. *Embry, Admr.*, 93 U. S. R., 548.

But these decisions are expressly limited to contracts made in good faith and services rendered thereunder by attorneys at law.

In the case of *Stanton* v. *Haskin*, 1 Mac Arthur, 558, the court held that agreements between attorneys and clients, fairly made, for contingent fees, will be sustained; but that the common law doctrines of champerty, as modified by decisions such as those above cited, are in force in the District of Columbia.

We submit that under these decisions, a contract whereby a party, who is not an attorney or counselor at law, undertakes the collection of moneys by suit in the courts, for a contingent fee of thirty per cent. of the money in controversy, is champertous and void, whether the champertor is to assume the office of attorney himself or is to employ an attorney to "assist" him.

Considering this as an action on the express contract claimed by appellant, for the whole fee, (less the $5,000, which appellant says Parrish was to pay Cooley,) it is clear there was no evidence to go to the jury, or on which they could find a verdict for appellant, which the court would not be bound to set aside.

III. THERE WERE NO CIRCUMSTANCES IN EVIDENCE FROM WHICH THE LAW WOULD RAISE AN IMPLIED CONTRACT ON WHICH SPAIDS COULD RECOVER AGAINST COOLEY.

There could be no recovery against Cooley on the count for work done, by Spaids at Cooley's request, because Spaids never did any work for Cooley, or at Cooley's request. Spaids testified distinctly that whatever he did in the case was done without Cooley's knowledge or consent, and "that he rendered no services in the case at the request "of Cooley or Clarke, and rendered none at all after his "first conversation with Cooley."

It is true Spaids testifies he rendered some services in the case, in taking depositions and in procuring Mr. Merriman to assist him (Spaids) in taking the testimony. For this, it may be, if not prevented by the illegality of his contract with Hudnall, he ought to recover whatever his services were reasonably worth. But his cause of action therein would be against Hudnall, who employed him, and at whose request, and in whose presence the services were rendered; and not against Cooley, who neither requested nor authorized them. There was no evidence in that regard on which a jury could have found a verdict for any amount against Cooley in this action. There was no evidence of the value of anything that Spaids did, how much time he spent upon it, or the value of his time at that period; nor of the value of Mr. Merriman's services, nor whether he has ever been paid, either by Spaids, Parrish, Hudnall, or any other person. There was no means of knowing what plaintiff's services were reasonably worth, if they were reasonably worth anything.

If the views and propositions above expressed are sound, it follows that the court did not err in refusing to give the instruction asked by plaintiff below, which is based upon the theory that the facts and circumstances above set forth constitute a valid cause of action in favor of Spaids and against Cooley.

IV. THE ANSWER OF PARRISH TO THE 7TH INTERROGATORY IN HIS DEPOSITION, (Rec., p. 7,) SO FAR AS IT CONSISTED OF CONVERSATIONS BETWEEN SPAIDS AND PARRISH, AND SOME OTHER PERSON, IN THE ABSENCE OF COOLEY, WAS PROPERLY EXCLUDED FROM THE JURY.

It is alleged as error that the Court below erred in sustaining the objection of the appellee to the answer of Parrish to the 7th interrogatory of his deposition. The appellee objected to this testimony on the ground that he was not to be charged with what was said by the person in Cooley's office, or by Spaids and Parrish, in the absence of Cooley, and the objection was sustained by the Court. The counsel for the appellant now admits that the objection would have been well taken, if made in time, but claims that the right to object was waived by the failure to make it before the trial commenced. But we do not so understand the law. Conceding, for the sake of the argument, that objections to the form or regularity of the taking of a deposition, should be made before the commencement of a trial, in order that the party taking it may not be surprised, and thus deprived of testimony upon which he relied, we do not understand that this requirement applies to the substance of the deposition, and particularly when it is apparent that by no change in the form of the interrogatory, or in any other possible way, could the evidence be made legal and admissible. A conversation between Spaids, the plaintiff, Parrish, and a third person, whether in Cooley's office or out of it, could in no manner bind the latter in his absence; and the objection made to the statement of this "person" applied with equal force to the conversation between Parrish and Spaids, and the Court properly ruled it all out. That the evidence was entirely incompetent, no lawyer can doubt, and that such testimony may be first objected to on the trial of the cause, has been repeatedly decided.

In *Horseman* v. *Todhunter*, 12 Iowa, 230, it was held that objections to a deposition, on the ground of irrelevancy of the testimony, may be first made on the trial. See, also, the following:

Palmer v. *Crook*, 7 Gray, 418;
Page v. *Parker*, 40 N. Hamp., 47;
McCreary v. *Truk*, 29 Ala., 244;
Heywood v. *Reed*, 4 Gray, 574;
Feagin v. *Beasley*, 23 Georgia, 17.

V. THE AFFIDAVIT OF JOSEPH E. SPAIDS, WHICH WAS OFFERED TO BE READ IN EVIDENCE AS A DEPOSITION, WAS PROPERLY EXCLUDED.

This affidavit was objected to and was inadmissible, we think, on the grounds, among others, that it is in narrative form; appears to have been given, not in answer to interrogatories propounded, but on the case generally; the witness was not expressly sworn to tell the truth, the whole truth, and nothing but the truth; it does not appear where the deposition, was taken; there is no certificate at the end of the deposition, except "Taken, subscribed and sworn to "before me, the day and year first above written. John M. "Robinson, Justice of the Peace." The caption is: "State "of Michigan, County of St. Clair, ss. On this thirty-first "day of December, A. D. 1879, before me, the undersigned, "a Justice of the Peace in and for the said county, personally appeared Joseph E. Spaids, of Algonac, in said county, "who, being by me duly sworn according to law, doth depose and say, *in relation to the case of Chauncey D. Spaids "versus Dennis N. Cooley hereto annexed*—said deponent states "as follows," &c.

There is no statute of the United States nor rules of the Supreme Court of the District of Columbia regulating the time or manner of making objections to the admission of depositions in evidence; and hence it follows that objections may be made at the time when it is proposed to read the deposition to the jury as a part of the testimony in the case. Until the deposition of Jos. E. Spaids was offered to be read, the defendant could not know that the plaintiff intended to use it, and the objections to its admission were, therefore, made in time. And the objections were properly sustained by the court. In the first place, it was taken before a justice of the peace, an officer not authorized by law to take depositions to be used in the courts of the United States. The Judiciary Act (Rev. Stats., 162,) designates the official character of the persons authorized to take depositions in such causes, and justices of the peace are not included in the enumeration; and the fact that the caption to the deposition recites that the justice was appointed by the court a commissioner for the purpose of taking it, does not give it validity. This objection alone, if no others existed, was fatal to the deposition, and the court properly excluded it from the jury.

But, if the court erred in sustaining the objections to the deposition, and it should have been admitted in evidence, did the error of the court work any injury to the appellant? A party complaining of error, must not only make the error manifest, but he must show that it was material in its character, and resulted to his disadvantage. This principle is so well settled and so uniformly recognized by all appellate tribunals, that it would be a work of supererogation to cite authorities in its support.

The deposition went solely to the question of a new promise sufficient to remove the bar of the statute of limitations, and was open to the same objections as the evidence of the appellant on the same point, which was afterwards excluded. It is another version, by the son, of the same conversation testified to by the father, and is not so reliable as the version of the father, because it does not appear to have been given in answer to any question, was given in the absence of any counsel for appellee, and there was no cross-examination upon it. It may, therefore, be considered together with the evidence of the father upon the same point, and must stand or fall with it.

VI. THE COURT PROPERLY REFUSED TO GIVE THE INSTRUCTIONS ASKED FOR BY THE APPELLANT, AND THE REFUSAL TO GIVE WHICH IS EMBRACED IN THE THIRD EXCEPTION, FOR THE FOLLOWING REASONS:

1. It virtually asked the court to instruct the jury to find that "if said Cooley did not any time, or at any time prior "to the judgment, inform the said Spaids that he had made "a new contract in the name of Cooley & Clarke, or any new "contract whatever with said Hudnall, then the appellee is "liable to the appellant," when, in fact, there was no testimony in the case which would justify the jury in finding any such fact. The only testimony offered upon this point

was that of Cooley himself, who distinctly testified that after he had seen Hudnall, and the latter had refused to give Cooley a lien upon the judgment as a security for the fee, "Spaids and Parrish called upon him, and he informed "them what had taken place between himself and Hudnall "—that Hudnall had declined to stipulate that the fee should "be made a lien upon the judgment, and that he declined to "have anything to do with the case unless he did." And again, in another part of his testimony, Cooley says that he "told Parrish and Spaids that the whole thing was at an "end." So long as this evidence stood uncontradicted, the court could not give the instruction asked for, and it would have been error if it had.

2. The instruction virtually asked the court to instruct the jury that any contract entered into between Cooley & Clarke and Hudnall, enured to the benefit of Spaids, which would have been clearly erroneous, if given. Whatever may have been the relations between Spaids and Cooley, these did not extend to Hudnall and Cooley & Clarke. After Hudnall and Cooley had both repudiated the contract concocted by Spaids, Hudnall was at liberty to make any new contract that he pleased; and, as Cooley had refused to act under the Spaids contract, he and his partner had the right to make another and different, contract with Hudnall, if the latter was so inclined. Spaids' name was not mentioned in the first contract, he was not a party to it upon its face, and he had no legal interest in it. Nor, after Cooley declined to act under it, and after he had so informed Spaids, did Cooley stand in any relation to Spaids that required Cooley to protect Spaids' interest. When Cooley and Hudnall, the two contracting parties named in the contract, mutually agreed to reject the contract—the first for the reason that Hudnall would not make the fee a lien upon the judgment, and the latter because he "could not get judgment at that "term" of the Court of Claims—the whole matter, in the language of Cooley, "was at an end."

But suppose we assume that the instruction was proper and should have been given, is the refusal of the court to give it, *without more*, such an error as the appellant can take advantage of? The bill of exceptions does not, nor does it purport to, give all the instructions which the jury received at the hands of the court, and this instruction may have been refused by the court for the reason that it had given it in other and simpler form. The instruction, as asked, was a long one, reciting certain facts which the plaintiff claimed to have proved, and was more likely to confuse than enlighten the jury. In *Mills* v. *Smith*, 8 Wallace, 27, this court held, that "courts of the United States are not bound "to give instructions upon specific requests by counsel for "them. If the court charges the jury rightly upon the case "generally, it has done all that it ought to do." So, in *Laber* "v. *Cooper*, 7 Ib., 565, it is decided that "it is not error to re-"fuse to give instructions asked for, even if correct in point "of law, provided those given cover the entire case, and sub-"mit it properly to the jury." And these decisions are in consonance with the earlier one in *Tome* v. *Dubois*, 6 Ib., 548, which holds that "refusal to grant specific prayers of a "party for instruction is not error, the substance of the re-"quested instructions being embraced in the instructions "actually given."

The presumption of law is always in favor of the regularity of the proceedings of the inferior tribunal. A party alleging error must make it apparent from the record, and it must not only be apparent, but it must have been such an error as worked injury to the party alleging it.

Cathcart v. *Com.*, 37 Penn. Stats., 108:
Garvin v. *Wells*, 8 Clarke, (Iowa), 286;
Finley v. *David*, 7 Ib., 3;
Cameron v. *Ward*, 22 Georgia, 168;
Pierson v. *Burney*, 15 Texas, 272;
Maynard v. *Penniman*, 10 Mich., 153.

Error cannot be presumed, but must be shown affirmatively; and, while the record in this case does show that the court refused the specific instruction asked by the appellant, it does not show that the court did *not* instruct upon this point, or that it refused to give any instruction upon the subject. In the absence of any statement in the bill of exceptions to the contrary, this court must presume that the court below gave the jury all proper and pertinent instructions; and until this presumption is overcome, the error of which the appellant complains, is not made clearly apparent.

VII. THE APPELLANT'S CAUSE OF ACTION, IF HE EVER HAD ANY, IS BARRED BY THE STATUTE OF LIMITATIONS, AND NO SUFFICIENT EVIDENCE OF A NEW PROMISE WAS GIVEN.

The transactions on which this action is based took place in 1866–'7. Appellant relies upon a new promise made in 1874–'5, after the bar of the statute was complete. He testifies that the conversation or admission upon which he relies occurred in Chicago, where he met appellee on the street, as he was on his way to Washington. Upon cross-examination, being asked to give the *precise words* of this conversation, appellant stated it as follows:

> " Remember quite distinctly, *I asked Cooley if he was going* " *to pay me that money in the Hudnall case, or whether he was* " *going to force me to further proceedings at law. He said:* ' *You* " ' *ought to have had that money long ago; it would have been* " ' *paid, but Clarke is behaving very badly in the matter; he has* " ' *part of it in his hands, and refuses to pay you. I do not know* " ' *but what I will have to pay you myself.*' That is as near pre- " cisely what he said as language can make it. I think I " cannot be much mistaken; that was as near as possible " the very language he used. I said to Cooley: '*Are you* " ' *going to pay me that money due me in that Hudnall case, or are* " ' *you going to force me to further legal proceedings to get it?*' He " said: '*Mr. Spaids, you ought to have had your money long ago,* " ' *but Mr. Clarke is behaving very badly in the matter; he has a* " ' *portion of the money in his hands, and refuses to contribute* " ' *towards paying you, and I do not know but that I will have to* " ' *pay you myself.*' " (Record, p. 10.)

This conversation is wholly denied by appellee, but taking it, for the purpose of this argument, as true throughout, it does not constitute such an acknowledgment of an existing debt, and such an unqualified and unconditional promise to pay it, as will remove the bar of the statute of limitations after it has once become complete. There is no reference to any amount claimed and admitted to be due. The expressions are: "That money due me in the Hudnall case," and "your money." What the amount may be is left wholly to conjecture. It may mean the whole fee, or one-half or one-third of it, or all of Cooley's share of it; or that, or some other amount, less $5,000, or it may refer to an indefinite amount supposed to be due from Hudnall, for services done by Spaids, before Cooley & Clarke took charge of the case. Even if the language: "You ought to have had that "money long ago; it would have been paid, but Clarke is "behaving very badly in the matter; he has part of it in his "hands, and refuses to pay you," can be regarded as an acknowledgment of a subsisting liability, it is the acknowledgment of a *partnership* debt—that of Cooley and Clarke—and not of the individual indebtedness of Cooley himself. Cooley nowhere admits his *personal* indebtedness; and that the admission, as sworn to by the appellant himself, who no doubt stated it in its strongest light, applied onl to the liability of the firm of Cooley & Clarke, is evident from the language placed in Cooley's mouth by Spaids, when the latter was called upon to repeat the words used by the appellee. He then makes Cooley say: "You ought to have "had your money long ago, but Mr. Clarke is behaving "very badly in the matter; he has a portion of the money "in his hands, *and refuses to contribute towards paying you;*" and if the suit had been instituted against the firm of Cooley & Clarke, this testimony would have been admissible to prove a subsequent promise by that firm.

That the admission, if such it can be called, was the admission of a *partnership*, and not a *personal*, liability, would have been still more apparent if the testimony of the younger Spaids had been admitted in evidence. The language put into the mouth of Cooley by this witness is: "Mr. Spaids, you ought to have had your money long ago, "for you got the case, and done most of the work in the "case before I knew much about it; but my partner, Mr. "Clarke, is acting very bad in the matter, and I don't know "but what I will have to pay the whole amount myself; "but I am now on my way to Washington, and while there "I will try and get the best settlement I can with Clarke, and "on my return from there, which will be in about ten days, "you shall have your money, if I have to pay it *all* myself." (Record, p. 13.) While this son of his sire states the admission and alleged promise much more strongly than his father, which throws doubt on the testimony of both, it is clear that Cooley regarded the debt as a partnership liability, and hence the promise was that he would try and get the best settlement he could with Clarke, his partner, who had been "acting very bad in the matter." The alleged promise is equally vague. "*I do not know but that I will have* "*to pay you myself.*" Judging from the persistence with which this plaintiff, for all these years from 1868 to the present time, has dogged the appellee, intercepting him on the streets of Chicago, on his way from his home in Iowa to his professional business at Washington, to serve process upon him, or to hold conversations with him which might be tortured or misrepresented into acknowledgments of debt and promises to pay, the appellee might well conclude that he did not know but that he would have to pay "that money," either in attorneys' fees or in some other way. But the words testified to by appellant cannot be construed to indicate a willingness and promise to pay, neither do these words specify any amount admitted to be due. It is preposterous to claim that Mr. Cooley, in any such vague and informal manner, in a casual conversation on the street, undertook or promised to pay appellant six thousand dollars.

The alleged promise, placed in its strongest light, is not an unqualified express promise to pay. For one man to say to another, who is making a claim against him, "*I do not* "*know but I will have to pay you myself*," when taken in connection with the previous statement showing a partnership liability, is but the expression of a fear or doubt, and nothing more than this can be legitimately inferred from the language. If the partnership were sued and the firm made liable, by a judgment against it, it might be that Cooley, in case of the insolvency of the firm, would have to pay it all himself; and to this extent, and no further, does the promise go. To take a case out of the statute there must not only be the admission of an existing liability, *but an expression of a willingness to pay*, and certainly the language ascribed to Cooley does not express such willingness.

It was the duty of the court to determine whether the alleged new promise was a sufficient acknowledgment of the debt to remove the bar of the statute, and it would have been a fatal error to have left the determination of that question to the jury.

Beasley v. *Evans*, 6 George, (35 Miss.,) 192.

In the leading case of *Bell* v. *Morrison*, 1 Peters, 355, the defense was the statute of limitations, to which a new promise was replied. To prove such new promise plaintiff introduced a witness, Baine, who testified that Morrison came to the house of witness and said to Bell, (the plaintiff,) that he was very anxious that his (the plaintiff's) account should be settled, adding: "I know we are owing you, and I am "anxious to have it settled." He then mentioned to plaintiff that he (Morrison) was getting old, and did not like to have such things hanging over him, and wished to have the business settled, and to have done with it. He then proposed to give the plaintiff seven thousand dollars, and close the business. The plaintiff refused to take it, and they parted. That no account or papers of any kind were shown or produced by Bell at the time of these conversations with Morrison, but he understood the conversations to relate to the claim for castings furnished by him to the company of Taylor, Wilkins, *et al.* Plaintiff also produced in evidence certain letters written by defendant, containing such expressions as: "I wish whatever is due you should be paid." "It is "not our wish to keep from you whatever may be your just "due." "I wish your account settled, and I have no hesi-"tation in saying, on your coming here, it will be done."

After plaintiff's evidence was closed, defendant's counsel moved the court to exclude the testimony of Baine, and all of the said letters; and the court excluded the evidence from the jury, and decided that there was no sufficient evidence or admissions by the defendants, or either of them, to prove such a promise as would take the case out of the statute of limitations, or should be left to a jury, as conducing to that effect.

The court, in a long and elaborate opinion, by STORY, J., reviewing all the cases, on the question "whether the ad-"mission of a party of the existence of an unliquidated ac-"count, on which something is due to the plaintiff, but no "specific balance is admitted, and no document produced "at the time, from which it can be ascertained what the "parties understood the balance to be, is sufficient to take "the case out of the statute, and let in the plaintiff to "prove, *aliunde*, any balance, however large it may be," held in the negative. The court say:

> "The evidence is clear of the admission of an unsettled "account, as well from the letters of Butler, as the conver-"sations of Morrison. The latter acknowledged that the "patnership 'was owing' the plaintiff; but as he had not "the books he could not settle with him. If this evidence "stood alone, it would be too loose to entitle the plaintiff "to recover anything. The language might be equally true, "whether the debt were one dollar or ten thousand dollars. "It is indispensable for the plaintiff to go further, and to "establish, by independent evidence, the extent of the bal-"ance due him, before there can arise any promise to pay "it as a subsisting debt. The acknowledgment of the party, "then, does not constitute the sole ground of the new im-"plied promise; but it requires other intrinsic aid before it

"can possess legal certainty. Now, if this be so, does it "not let in the whole mischief intended to be guarded "against by the statute? Does it not enable the party to "bring forward stale demands, after a lapse of time, when "the proper evidence of the real state of the transaction "cannot be produced? Does it not tend to encourage per-"jury, by removing the bar upon slight acknowledgments "of an indeterminate nature? Can an admission that some-"thing is due, or some balance owing, be justly construed "into a promise to pay any debt or balance which the party "may assert or prove before a jury?"

The court say further, on page 360:

"If we proceed one step further, and admit that loose and "general expressions, from which a probable or possible in-"ference may be deduced of the acknowledgment of a debt, "by a court or jury; that, as the language of some cases "has been, any acknowledgment, however slight, or any "statement not amounting to a denial of the debt; that any "admission of the existence of an unsettled account, with-"out any specification of amount or balance, and however "indeterminate and casual, are yet sufficient to take the "case out of the statute of limitations, and to let in evi-"dence aliunde to establish any debt, however large, and at "whatever distance of time; it is easy to perceive that the "wholesome objects of the statute must be in a great meas-"ure defeated, and the statute virtually repealed."

On the question of the nature of the expressions from which a new promise may be implied, the court say:

"If there be no express promise, but a promise is to be "raised by implication of law from the acknowledgment "of the party, such acknowledgment ought to contain an "unqualified and direct admission of a present subsisting "debt, which the party is liable and willing to pay. If there "be accompanying circumstances, which repel the presump-"tion of a promise or intention to pay; if the expressions be "equivocal, vague and indeterminate, leading to no certain "conclusion, but at best to probable inferences, which may "affect different minds in different ways, we think they "ought not to go to a jury as evidence of a new promise to "revive the cause of action. Any other course would open "all the mischiefs against which the statute was intended to "guard innocent persons, and expose them to the dangers "of being entrapped in careless conversations, and betrayed "by perjuries."

This decision has been followed in numerous well-considered cases, in many of which the exact language of the Supreme Court, *supra*, is adopted. See

Otterback v. *Brown*, 2 MacArthur, 541;
Wachter v. *Albee*, 80 Ill. Rep., 47;
Carroll v. *Forsythe*, 69 Ill. Rep., 127;
Senseman v. *Herschman*, 82 Pa. St., 83;
Miller v. *Baschore*, 82 Pa. St., 356;
Faison v. *Bowden*, 76 N. C., 425;
Sedgwick v. *Gerding*, 53 Ga., 264.

In *Moore* v. *Stevens*, 33 Vermont, 308, the defendant, after the commencement of the action, and about the time of its trial, admitted that the plaintiff's account was just when it accrued, but claimed that he had paid it to one E., and that E. was authorized by the plaintiff to receive such payment; and the defendant, at the same time, promised to pay the account to the plaintiff, if he did not prove that he paid it. The defendant failed to prove that E. was authorized to receive payment, or that he had paid the account; and it was held that this was not a sufficient acknowledgment of the claim to take it out of the operation of the statute.

In *Mills* v. *Taber*, 5 Jones, (N. C.) 412, where the defendant, upon the presentation of an account, said that he "supposed it was right, and was willing to settle and give his "note; but he thought the plaintiff had not given him all "the credit he was entitled to," it was held that these expressions did not amount to a new promise.

In *Emerson* v. *Miller*, 27 Penn. Stat. 278, the defendant, upon presentation of the account, remarked that "he "would attend to it, settle it, or fix it, before he went "away;" and it was held that neither expression amounted to a promise or acknowledgment sufficient to take the case out of the statute.

In *Shitler* v. *Bremer*, 23 Penn. Stat., 413, it was held that "a naked admission of indebtedness, without indicating the "*amount* or *nature* of the debt, or a promise to pay some- "thing, without any reference to the *sum to be paid*, or what "it is to be paid for, is no answer to the plea of the statute of "limitations;" and to the same purport is *Huff* v. *Richardson*, 19 Penn. Stat., 388; *Suter* v. *Sheeler*, 22 Penn. Stat., 308; *McRae* v. *Leary*, 1 Jones, (N. C.) 91.

And the general principle, governing all the cases is, that to take a debt out of the statute of limitations, there must be an explicit acknowledgment of an existing liability, accompanied by a promise to pay, expressed or naturally implied from the circumstances.

Chambers v. *Garland*, 3 Iowa, 322;
Stockett v. *Sasscer*, 8 Md., 374;
Wakeman v. *Sherman*, 5 Selden, 88;
Pritchard v. *Howell*, 1 Wisconsin, 131.

Applying the principle of these cases to the case at bar, and it will be seen at once that the court properly charged the jury that the "plaintiff had not offered sufficient evi- "dence of a new promise on the part of the defendant to "take the case out of the statute." The most that can be claimed from the language of the defendant below is the acknowledgment of a subsisting liability, and this is not only very vague but was positively denied by the appellee. The words used are: "You ought to have had that money "long ago. It would have been paid, but Clarke is behav- "ing very badly in the matter; he has part of it in his "hands, and refuses to pay you." No sum is mentioned, and the only reference to the subject matter of the claim is "that money in the Hudnall case." And then the language from which a promise is attempted to be extorted is "*I do* "*not know but that I will have to pay you myself.*" Compare this with the language relied upon in the case of *Bell* v.

Morrison, or in *Mills* v. *Taber* or in *Emerson* v. *Miller*, *supra*, not to cite other cases, and it will be seen at once that in all of these cases the alleged acknowledgment of liability and promise to pay was much more distinct and positive than the language attributed to the defendant below in this case, and yet they were held insufficient to take the cases out of the statute. And if the decisions in these cases are law, then the decision of the court in this case was correct, and the jury were properly instructed upon this point. And when it is remembered that the only witnesses to prove the alleged new promise was the plaintiff and his son, who, in testifying five years after the alleged conversation between the plaintiff and defendant, uses substantially the same language that the father put into the mouth of the defendant, thus showing that the son had been *coached* and made to feel the necessity of supporting his sire, this court may well, as the court below did, doubt the accuracy and reliability of the testimony.

Tested by the rules above laid down, neither the version of this alleged conversation given by the son, Joseph E. Spaids, in his deposition, nor that given by the father, the present plaintiff, *supra*, was competent to go to the jury, and the court below did not err in excluding it.

VIII. IF THE EVIDENCE OF THE APPELLANT DID NOT SHOW A VALID ORIGINAL CAUSE OF ACTION; OR IF THE EVIDENCE OF A NEW PROMISE WAS NOT SUFFICIENT TO GO TO THE JURY; IN EITHER CASE THE COURT WAS JUSTIFIED IN DIRECTING A VERDICT FOR THE APPELLEE, AND THE OTHER ERRORS COMPLAINED OF BY APPELLANT ARE IMMATERIAL.

In the case of *Merchants' Bank* v. *State Bank*, 10 Wall., 637, the court say:

> "This is a writ of error to the Circuit Court of the United "States for the District of Massachusetts. The plaintiff in "error was the plaintiff in the court below. It appears by "the bill of exceptions, that upon the evidence in behalf of

"the plaintiff being closed, the defendant's counsel moved "the court to instruct the jury that it was not sufficient to "warrant them to find a verdict for the plaintiff upon either "of the counts in the declaration. This instruction was "given. The jury found for the defendant. The plaintiff "excepted, and has brought that instruction here for review. This renders it necessary to examine the entire "case, as presented in the record. According to the settled "practice in the courts of the United States, it was proper "to give the instruction if it were clear the plaintiff could "not recover. It would have been idle to proceed further "when such must be the inevitable result. The practice "is a wise one. It saves time and costs; it gives the "certainty of applied science to the results of judicial investigation; it draws clearly the line which separates "the provinces of the judge and the jury, and fixes where "it belongs the responsibility which should be assumed "by the court."

In *Barth* v. *Clise*, sheriff, 12 Wall., 401, it was held that where the record shows that the case of a plaintiff is inherently and fatally defective, a judgment against him will not be reversed for instructions, however erroneous. The court say:

"The plaintiffs in error, according to their own showing, "had not the shadow of a right to recover in this action "against Clise. Conceding, for the purpose of this opinion, "that the court below erred in all the particulars complained "of, the errors have done them no harm, opposite rulings "could not have helped them. Their case was inherently "defective. The defect was incurable and inevitably fatal. "When such a defect exists, whether it be or be not brought "to the attention of the court below, or of this court, by "counsel, it is our duty to consider it and give it effect. "This is decisive of the case before us."

The remarks of the Supreme Court in *Maguire* v. *Corwine*, 101 U. S. Rep., 108, are pertinent to this case:

"In *Trist* v. *Childs*, *supra*, while recognizing the validity of "an honest claim for services honestly rendered, this court "said, 'but they are blended and confused with those which

" 'are forbidden; the whole is a unit and indivisible. That " 'which is bad destroys that which is good, and they perish " 'together. * * Where the taint exists, it affects fatally " 'in all its parts the entire body of the contract. In all " 'such cases *patior conditio defendentis.* Where there is turpitude the law will help neither party.' These remarks " apply here. The contract is clearly illegal, and this action " was brought to enforce it. This conclusion renders it unnecessary to consider the plaintiff's other assignments of error. The case being fatally and fundamentally defective, " he could not recover. Conceding all his exceptions other " than those we have considered, to be well taken, the errors committed could have done him no harm, and opposite rulings would have done him no good. In either view " these alleged errors are an immaterial element in the case."

Believing that the court did not err in directing a verdict for the appellee; that the evidence offered of a new promise was not sufficient to go to the jury to remove the bar of the statute; that if it had been admitted, the jury could have found no verdict against appellee upon it which the court would not set aside, because there was no valid original cause of action to be revived; that the case of the appellant, upon his own showing, was fatally and inherently defective,—and that no further argument is needed to establish these points, the above is respectfully submitted.

It is proper to say, in conclusion, that I have been compelled to prepare this brief without having before me a copy of the record, or any assignment of errors in this court, neither having been printed as yet; and that in preparing it, I have acted upon the assumption that the errors assigned, and points made, in the court below, are those which would be urged in this court, and have confined myself to the questions thus raised.

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